In The

Supreme Court of the United States

October Term, 1976

No. 76-1597

BASSETT FURNITURE INDUSTRIES, INC.

and

BASSETT MIRROR COMPANY, INC.,

Petitioners,

vs.

AARON BRAVMAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Appendix to Petition) is reported at 552 F.2d 90 (1977). The District Court delivered no opinion in granting defendants' motions for directed verdicts.

QUESTIONS PRESENTED

Whether this Court should review a decision of the Court of Appeals holding that:

(1) an independent manufacturers' sales representative has standing under Section 4 of the Clayton Act to challenge product and territory restraints of trade imposed directly upon him by two dominant furniture manufacturers acting in concert; and

(2) the reasonableness of the challenged restraints under Section 1 of the Sherman Act should be submitted to a jury for determination, and therefore a trial judge's directed verdicts in favor of the manufacturers were improper, where plaintiff's evidence showed that there was no legitimate business reason for the restraints, which were aimed at enhancing the competitive position of the manufacturers and their sales representatives.

STATEMENT OF THE CASE

Plaintiff Aaron Bravman relies upon the statement of the case as contained in the majority opinion of the Court of Appeals (see Petition, pp. 2a-6a, 9a-12a, 13a-15a, 26a-28a, 29a-30a, 31a-33a), but briefly summarizes the facts here.

Bravman is an independent furniture manufacturers' sales representative who, prior to 1959, solicited orders from retailers for the case goods line of Bassett Furniture Industries, Inc. ("Bassett Furniture") and for the products of competing furniture manufacturers. In 1959 Bravman agreed to sell, in addition to Bassett Furniture's case goods line, Bassett Furniture's table line and also the products of Bassett Mirror Company, Inc. ("Bassett Mirror"), a separate but affiliated corporation. In so doing, Bravman further agreed, at defendants' request, to terminate his relationships with all other furniture companies and to restrict his sales activities for the Bassett products to a defined territory in Pennsylvania.

Bassett Furniture, located in Bassett, Virginia, is the self-described world's largest furniture manufacturer, a giant in an industry composed almost entirely of very small companies (Appellant's Appendix in the Court of Appeals, pp. 252a-53a, 256a, 260a-62a).

During the course of the period 1960-1970, Bravman's sales efforts more than doubled the sales volume of Bassett products within the territory assigned to him, to over $1,500,000 per year (Appellant's Appendix in the Court of Appeals, pp. 99a-100a, 105a-08a, 569a, 662a). To increase sales, Bravman personally guaranteed the credit worthiness of many of his accounts, in amounts exceeding $300,000 per year (*Id.*, pp. 98a, 103a-04a, 111a-14a, 511a, 589a, 664a-66a). At the insistence of Bassett Furniture, in 1969 Bravman hired a full time sales assistant, at his own expense.

In May of 1970 Bassett Furniture took away from Bravman its table line and the products of Bassett Mirror, an action the

Court of Appeals unanimously held would support a jury finding of breach of contract by the Bassett companies. Despite a scarcity then existing in the supply of Bassett Furniture's case goods (Bravman's sole remaining line) such that Bassett Furniture actually rationed these products, Bassett Furniture continued to insist that Bravman, while retaining his full time employee, not sell the products of competing furniture companies (including products which would have enabled Bravman to carry a full line of furniture). Because of the resulting severe drop in Bravman's net income, and because he considered defendants to have breached their agreement with him, Bravman began to sell the products of other, smaller, furniture manufacturers located throughout the country, and did so in substantial quantities (Appellant's Appendix in the Court of Appeals, pp. 197a, 220a-21a, 238a-41a, 246a-48a, 513a-14a). Bravman's activities on behalf of other companies in no way hampered his ability to sell the quantities of Bassett Furniture case goods allotted to him. For this asserted "disloyalty" Bravman was abruptly terminated as a Bassett Furniture case goods representative.

The Court of Appeals held unanimously that Bravman had standing to sue the Bassett companies under Section 4 of the Clayton Act, 15 U.S.C. §15; held by 2-1 decision that the facts presented by Bravman would sustain a jury finding that defendants had violated Section 1 of the Sherman Act, 15 U.S.C. §1; and held unanimously that Bravman's evidence would not sustain a jury finding against defendants under Section 2 of the Sherman Act, 15 U.S.C. §2.

ARGUMENT

I.

The nature of the decision of the Court of Appeals does not warrant granting defendants' petition for a writ of certiorari.

The decision of the Court of Appeals, holding only that the evidence presented by plaintiff warranted submitting his claim for damages under Section 1 of the Sherman Act to a jury for determination of the reasonableness of the restraints defendants jointly imposed upon him, does not present issues warranting the exercise of this Court's discretion to grant the petition for a writ of certiorari. The decision below was based upon application of accepted principles to the very unique facts presented in this case, where two dominant furniture manufacturers, which utilized a nationwide network of independent sales representatives, insisted upon strict enforcement of restrictions jointly imposed by them on the representatives, including plaintiff, prohibiting the sale of competing products or the sale of any furniture products outside a defined territory, despite the manufacturers' own inability or unwillingness to provide those representatives with an adequate supply of furniture merchandise to sell. Moreover, defendants presented no evidence whatsoever in the trial court, and the reasonableness or lack of reasonableness of the restraints complained of by plaintiff has not been determined by the fact finder in light of all the circumstances, including any evidence of defendants.

II.

The decision below that plaintiff's evidence states a cause of action under Section 1 of the Sherman Act is clearly correct and consistent with the decisions of this Court and those of other Courts of Appeals.

A. Standing to sue

The decision of the Court of Appeals that Bravman has standing under Section 4 of the Clayton Act, 15 U.S.C. §15, to sue defendants for violations of the Sherman Act arising out of the trade restraints they jointly imposed directly upon him is compelled by the decisions of this Court:

> "By §1, Congress has made illegal: 'Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . .' *Standard Oil Co. v. United States*, 221 U.S. 1. Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."

Radiant Burners, Inc. v. People Gas Light & Coke Co., 364 U.S. 656, 660 (1961) (per curiam); *Perkins v. Standard Oil Co.*, 395 U.S. 642, 649-50 (1969); *Radovich v. National Football League*, 352 U.S. 445, 453 (1957); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

As the Court of Appeals observed in the course of its careful analysis of the standing question (Petition, pp. 15a-28a), the restraints imposed jointly by defendants "operated directly" on Bravman to prevent him from representing competing furniture manufacturers and from selling Bassett products outside his assigned territory in competition with other representatives selling Bassett products (Petition, p. 26a). Moreover, as a competitor or potential competitor of sales representatives who sold Bassett products, Bravman was within the "target area" of those at whom the restraints were aimed (Petition, p. 27a).

The conclusion of the Court of Appeals ("Allowing Bravman to act as a private attorney general in challenging conduct which directly restrains his ability to sell furniture products carries out both the policies behind §4 and the substantive policies of the antitrust laws.") (Petition, p. 27a) reflects an approach to determining standing to sue for antitrust violations completely in keeping with the decisions of this Court and the lower court decisions cited by defendants.

B. Plaintiff's claim under Section 1 of the Sherman Act

Defendants do not challenge the finding of the Court of Appeals that, acting in concert, they restrained Bravman from selling the products of other furniture manufacturers, even at a time when defendants lacked a sufficient supply of goods to fill Bravman's orders, and from selling furniture products outside a territory specified by them (Petition, pp. 29a-30a). It is defendants' contention in this Court that the restraints they imposed upon the conduct of Bravman's business (indeed, upon

the conduct of all of their sales representatives' businesses) could not be found to be unreasonable by the finder of the facts under the circumstances of this case, because there was no direct evidence of a "distribution bottleneck" caused by the restraints, harming other furniture manufacturers, and thus there could be no injury to competition (Petition, pp. 7-8).

As the majority opinion below observed (Petition, p. 27a):

> "Though the alleged restraints were obviously aimed at enhancing the competitive position of the Bassett Companies vis-a-vis other furniture manufacturers they were also aimed at enhancing the competitive position of Bassett's sales representatives."

Thus, as a seller or potential seller of competing products Bravman was himself a competitor or potential competitor of defendants and their other sales representatives. At a time when defendants could not adequately supply Bravman with their own merchandise to sell, they nevertheless continued to insist that he not sell the products of competing furniture companies and that he not sell any products outside the territory they specified. Based on the admitted and improperly excluded evidence, the majority held (Petition, p. 33a):

> ". . . [A] jury could have found that Bassett Furniture, a comparative giant in the furniture manufacturing business, acting in concert with Bassett Mirror, imposed upon Bravman a restraint having no significant relationship to any legitimate business interest, but only an anti-competitive result."

The conclusion of the majority, that on the facts of this case a jury could find a violation of Section 1 of the Sherman Act, is fully in accord with the decisions of this Court. Thus in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), this Court reversed a summary judgment in favor of defendants who were alleged to have conspired not to sell products to the plaintiff retailer, or to sell only on unfavorable terms. Defendants (manufacturers and retailers competing with plaintiff) submitted unchallenged affidavits that the same products were freely available at other retailers, and therefore there could be no injury to the public. This Court rejected the argument that proof of a "public injury" was necessary for a Sherman Act violation, and held that the alleged conspiracy "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." 359 U.S. at 213 (footnote omitted). *Accord, In re McConnell*, 370 U.S. 230, 231 (1962) ("[w]e have held that the right of recovery of a plaintiff in a treble damage antitrust case does not depend at all on proving an economic injury to the public"); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-60 (1961) (per curiam). Defendants' contention that there must be proof of a "distribution bottleneck" to sustain a violation of Section 1 of the Sherman Act is an attempt to impose as a required element the independent "public injury" concept previously rejected by this Court.

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690 (1977), relied upon by defendants, the complaining companies' injuries were unrelated to the allegedly illegal nature of Brunswick's activities. In the present case, the restraints imposed by the Bassett companies could only have impeded competition by plaintiff, and they directly and immediately caused him injury. Moreover, as the Court of Appeals correctly held, a fact finder could have concluded that the restraints imposed upon Bravman by defendants were not "fairly necessary" in light of all the circumstances of the case (Petition, pp. 31a-33a). *See Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 373, 406 (1911) ("To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy."); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248-49 (3rd Cir. 1975).

CONCLUSION

For the foregoing reasons, this Court should deny defendants' petition for a writ of certiorari.

Respectfully submitted,

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